A

Superintendent of Lands and Surveys, Bintulu Division v Derawan Sdn Bhd & Ors and another appeal

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01–80–02 OF 2012 AND Q-01–79–02 OF 2012
AZAHAR MOHAMED, DAVID WONG AND ABANG ISKANDAR JJCA
19 MAY 2014

C

Land Law — Acquisition of land — Objection against compensation — Compensation not paid for value of lands compulsorily acquired — Contention that registered provisional lease (PL) holders had no proprietary interest in land until final survey of land completed — Sarawak Land Code (Cap 81) s 28(1) — Argument that s 37(a) of the Code also applied to deny PL holders of compensation — Whether both arguments unsustainable and compensation payable — Whether High Court's determination of fair market value of acquired lands correct and appropriate

D

E

Plantation lands belonging to the six respondents in the two appeals herein were compulsorily acquired by the Sarawak Government for gas pipeline projects. In both cases, the land owners were not compensated for the value of their lands and, wherever applicable, compensation was only paid for the value of crops cultivated and for such items as gravel roads and wooden bridges. By separate references to the High Court under s 56 of the Sarawak Land Code ('Land Code'), the respondents in the two appeals disputed the compensation amounts awarded. In Appeal No 80–02 of 2012, the High Court, sitting with two assessors, determined the fair market values for matured/developed land and raw plantation land to be, respectively, RM5,000 per hectare and RM23,500 per hectare and that each oil palm tree was worth RM75. In Appeal No 79–02 of 2012, the High Court, again sitting with two assessors, adopted the comparable sales valuation approach and valued the cultivated and non-cultivated lands to be, respectively, RM23,000 and RM6,000 per hectare. The instant appeals were against the decisions of the High Court in revising the compensation amounts awarded by the appellants. In Appeal No 79–02 of 2012, the appellant argued that the respondents were not compensated for land value because (i) they were registered owners of provisional leases ('PLs') and therefore did not have proprietary interest in the lands. The appellant contended that based on s 28(1)–(2) of the Land Code and special condition (iii) of the PLs, the lands could not be considered to have been 'alienated' until the respondents had carried out a final survey of the lands, and (ii) the government had implied rights under s 37(a) of the Land Code to enter upon the lands to, inter alia, lay pipes and cables for water, gas or electricity supply, and compensation was only payable if there was damage caused or the owners'

F

G

H

I

enjoyment of the land was interfered with. Both arguments were rejected by the High Court which held that, in the first case, the proviso to s 28(1) allowed the appellant to order PLs to be issued in favour of persons entitled when immediate survey of any state land was impracticable; that once the PLs were registered, the person entitled thereto became the registered owner thereof and if the land was acquired, the owner had to be reasonably compensated. The High Court also held there was nothing in s 28 or in the PLs requiring the PL holders to carry out and complete a survey within a certain time. In the second case, the High Court held that s 37(a) had no application as it did not provide for land to be acquired without payment of compensation. Moreover, at the time the PLs were issued, the owners had no prior notice their lands would be acquired for gas pipeline laying works and therefore it was unjust to deny them of compensation for the acquisition.

Held, dismissing both appeals with costs of RM20,000 for each appeal:

(1) The respondents in Appeal No 79–02 of 2012 were the legal, registered and beneficial owners of the lands under the provisional leases. Consequently, art 13 of the Federal Constitution applied and they were entitled to be adequately compensated for the loss of their lands and when the appellant failed to pay the compensation, he was in breach of his constitutional duty (see para 32).

(2) To interpret s 28 of the Land Code in the way done by the appellant would lead to absurdity and be an affront to fairness and reasonableness. If the Legislature had intended the interpretation proposed by the appellant, it could have easily left out the proviso to s 28(1) or given the respondents only a licence to enter the lands. If the appellant's view was correct there would have been no necessity to invoke s 48 of the Land Code to acquire the lands or to have followed the procedures laid down in ss 47, 49 and 51 of the Code. One could only acquire against a person who had rights to the land. The actions of the appellant spoke for itself (see paras 30–31).

(3) The curt agreed with the High Court's holding with regard to s 37 of the Land Code and found no merit in the appellant's argument with regard thereto (see paras 37–38).

(4) The valuations arrived at by the High Court was with the benefit of two assessors who were qualified valuers. The High Court had taken all relevant considerations into account, deliberated upon the investment method used by the respondents and the comparable sales method adopted by the appellant and adopted the latter method. There was no merit in the appellant's complaints as to the manner in which the High Court arrived at its decision. The findings by the High Court in a land reference should not be disturbed unless there were cogent reasons to show the findings were so perverse and unreasonable that no reasonable

tribunal similarly circumstanced would have come to that decision. The burden to prove those cogent reasons lay with the appellant (see paras 40–42 & 46).

[Bahasa Malaysia summary

Tanah perladangan kepunyaan enam responden di dalam dua rayuan telah diperolehi secara wajib oleh Kerajaan Negeri Sarawak untuk projek saluran paip gas. Dalam kedua-dua kes, pemilik tanah tidak diberikan pampasan untuk nilai tanah-tanah mereka, di mana berkenaan, pampasan hanya dibayar untuk nilai tanaman yang ditanam dan bagi perkara-perkara seperti jalan batu kelikir dan jambatan kayu. Dengan rujukan-rujukan berasingan di Mahkamah Tinggi di bawah Kanun Tanah Sarawak ('Kanun Tanah'), responden-responden di dalam dua rayuan mempertikaikan jumlah pampasan yang diawardkan. Dalam Rayuan No 80–02 Tahun 2012, Mahkamah Tinggi, bersama dua penaksir, menentukan nilai pasaran yang adil untuk tanah matang/dibangunkan dan tanah perladangan mentah menjadi, masing-masing, RM5,000 sehektar dan RM23,500 setiap hektar dan setiap pokok kelapa sawit bernilai RM75. Dalam Rayuan No 79–02 Tahun 2012, Mahkamah Tinggi, sekali lagi bersama dua penaksir, mengguna pakai pendekatan penilaian jualan yang setanding dan menilai tanah tanaman dan bukan tanaman menjadi, masing-masing, RM23,000 dan RM6,000 bagi setiap hektar. Rayuan segera adalah terhadap keputusan Mahkamah Tinggi dalam menyemak semula jumlah pampasan yang diawardkan oleh perayu-perayu. Dalam Rayuan No 79–02 Tahun 2012, perayu berhujah bahawa responden tidak diberi pampasan untuk nilai tanah kerana (i) mereka pemilik berdaftar pajakan sementara ('pajakan sementara') dan oleh itu tidak mempunyai kepentingan harta dalam tanah. Perayu berhujah bahawa berdasarkan kepada s 28(1)–(2) Kanun Tanah dan syarat khas (iii) pajakan sementara, tanah tidak boleh dianggap sebagai telah 'alienated' sehingga responden telah menjalankan pemeriksaan muktamad terhadap tanah, dan (ii) kerajaan mempunyai hak tersirat di bawah s 37(a) Kanun Tanah untuk memasuki tanah-tanah kepada, antara lain, memasang paip dan kabel untuk air, gas atau elektrik, dan pampasan hanya dibayar jika terdapat kerosakan atau kenikmatan pemilik tanah telah diganggu. Kedua-dua hujah telah ditolak oleh Mahkamah Tinggi memutuskan bahawa, dalam kes pertama, proviso s 28(1) membenarkan perayu untuk memerintahkan pajakan sementara untuk dikeluarkan atas nama orang yang berhak apabila pemeriksaan segera terhadap mana-mana tanah negeri adalah tidak praktikal; bahawa apabila pajakan sementara telah didaftarkan, orang yang berhak kepadanya menjadi tuan punya berdaftar dan jika tanah itu telah diperolehi, pemilik perlu diberi pampasan munasabah. Mahkamah Tinggi juga memutuskan tiada apa-apa dalam s 28 atau dalam pajakan sementara memerlukan pemegang pajakan sementara untuk menjalankan dan menyelesaikan pemeriksaan dalam masa yang tertentu. Dalam kes kedua, Mahkamah Tinggi memutuskan bahawa s 37(a) tidak terpakai kerana tidak memperuntukkan peruntukan bagi tanah

diperolehi tanpa bayaran terhadap pampasan. Selain itu, pada masa yang PLs telah dikeluarkan, pemilik tidak mendapat notis terdahulu bahawa tanah mereka akan diperolehi bagi kerja-kerja saluran paip gas dan oleh itu ia adalah tidak adil untuk menafikan pampasan mereka untuk pengambilalihan.

Diputuskan, menolak kedua-dua rayuan dengan kos sebanyak RM20,000 bagi setiap rayuan:

(1) Responden dalam Rayuan No 79–02 Tahun 2012 ialah pemilik undang-undang berdaftar dan berfaedah, tanah-tanah di bawah pajakan sementara. Oleh itu, perkara 13 Perlembagaan Persekutuan terpakai dan mereka berhak untuk dibayar pampasan secukupnya untuk kehilangan tanah mereka dan apabila perayu gagal membayar pampasan tersebut, ia telah melanggar kewajipan perlembagaannya (lihat perenggan 32).

(2) Untuk mentafsir s 28 Kanun Tanah dengan cara yang dilakukan oleh perayu akan membawa kepada kemustahilan dan menjadi satu penghinaan kepada keadilan dan kewajaran. Jika Badan Perundangan berniat kepada tafsiran yang dicadangkan oleh perayu, ia boleh dengan mudah meninggalkan proviso s 28(1) atau hanya memberikan kepada responden lesen untuk memasuki tanah. Jika pandangan perayu adalah betul tidak akan ada sebarang keperluan untuk menggunakan s 48 Kanun Tanah untuk memperolehi tanah-tanah atau telah mengikuti tatacara yang ditetapkan di dalam ss 47, 49 dan 51 Kanun Tanah. Seseorang hanya boleh memperoleh terhadap seseorang yang mempunyai hak ke atas tanah. Tindakan perayu bercakap untuk dirinya sendiri (lihat perenggan 30–31).

(3) Mahkamah bersetuju dengan keputusan Mahkamah Tinggi berkenaan dengan s 37 Kanun Tanah dan mendapati tiada merit dalam hujah perayu berkenaan dengannya (lihat perenggan 37–38).

(4) Penilaian yang dicapai oleh Mahkamah Tinggi adalah dengan faedah dua penaksir, yang merupakan penaksir berkelayakan. Mahkamah Tinggi telah mengambil segala pertimbangan yang berkaitan, mempertimbangkan kaedah pelaburan yang digunakan oleh responden dan kaedah jualan setanding diguna pakai oleh perayu dan mengguna pakai kaedah kedua. Tidak ada merit dalam aduan perayu tentang cara di mana Mahkamah Tinggi membuat keputusannya. Dapatan oleh Mahkamah Tinggi dalam rujukan tanah tidak boleh diganggu kecuali jika ada sebab-sebab yang meyakinkan untuk menunjukkan dapatan adalah sangat bercanggah dan tidak munasabah bahawa tiada tribunal munasabah juga diletakkan dalam keadaan tertentu akan sampai kepada keputusan itu. Beban untuk membuktikan sebab-sebab yang meyakinkan terletak pada perayu (lihat perenggan 40–42 & 46).]

Notes

For cases on objection against compensation, see 8(1) *Mallal's Digest* (4th Ed, Reissue) paras 2360–2362.

Cases referred to

Austral Enterprise Bhd v The Superintendent of Land and Survey (Land Reference No 15–2–2006 (BTU) (unreported)), (refd)

Haji Ali bin Haji Othman v Telekom Malaysia Bhd [2003] 3 MLJ 29; [2003] 3 CLJ 310, CA (refd)

Iun Chung Yang & Anor v Superintendent of Lands and Surveys, First Division, Sarawak [1980] 2 MLJ 15; [1979] 1 LNS 35, FC (refd)

Leong Kam Hoong v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam and another appeal [2001] 1 MLJ 186; [2001] 1 CLJ 1, CA (refd)

Sebakai Plantation Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu Division Land Reference No 15–04–2008 (BTU) (unreported), (refd)

Wangsa Mujur Sdn Bhd v The Superintendent Lands and Surveys Miri Division, Sarawak and other applications [2013] 10 MLJ 452; [2012] 1 LNS 120, HC (refd)

Legislation referred to

Federal Constitution art 13

Sarawak Land Code ss 28, 28(1), 37, 37(a), 47, 48, 49, 51, 56

Appeal from: Land Reference Nos 15–02 of 2008 (BTU), 15–03 of 2008 (BTU) and 15–06 of 2008 (BTU) (High Court, Bintulu) and Land Reference Nos 15–1 of 2010 (MR), 15–6 of 2010 (MR) and 15–7 of 2010 (MR) (High Court, Miri)

JC Fong (Ivy Suli Untup with him) (State Attorney General's Chambers, Sarawak) for the appellant.

Siti Norashidah bt Dollah (Huang & Co) in Civil Appeal No Q-01–79–02 of 2012 for the respondent.

Ma Seong Yuin (Louis Achuk with him) (Kadir, Wong, Lin & Co) in Civil Appeal No Q-01–80–02 of 2012 for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal with the consent of respective counsel is heard together with appeal Q-01–79–02 of 2012 ('Appeal 79 of 2012') as they concern substantially the same issues.

[2] Both appeals are against the decisions of two different High Courts relating to an issue of compensation amount paid for lands compulsorily acquired by the state government.

[3] On 3 December 2013, we heard the appeals and after hearing submissions from counsel, we reserved our judgments. We now give our decisions and our reasons in respect of the two appeals.

BACKGROUND FACTS

Civil Appeal No Q-01–80–02 of 2012 ('Appeal 80/12')

[4] This case relates to three land references which are as follows:

(a) LR 15–2 of 2008 (BTU) — Derawan Sdn Bhd;

(b) LR 15–3 of 2008 (BTU) — Austral Enterprise Bhd; and

(c) LR 15–6 of 2008 (BTU) — Golden Hope Plantation (Sarawak) Sdn Bhd.

[5] The three parcels of land were acquired by the State Government of Sarawak pursuant to *gazette* notification under s 48 of the Land Code ('s 48 notice') on 4 October 2007. The purpose of the acquisition is for the construction of the Sabah-Sarawak Gas Pipeline Project, Bintulu Division Sector.

[6] The particulars of the three parcel originating summons lands are as set-out in the submission of the appellant which we for convenience reproduce herein:

No	Land Reference	Parties	Size Area and Location
1	LR15-2-2008 (BTU)	Derawan Sdn Bhd v Supt of Lands and Surveys, Bintulu	Lot 16 Block 13 Kemena Land District (being part of Lot 2099 Kemena Land District) containing an area acquired 3.589) hectares and situated at KM42 Miri-Bintulu Road to the north east of Bintulu Town
2	LR15-3-2008 (BTU)	Austral Enterprise Bhd v Supt of Lands & Surveys, Bintulu	a. Lot 86 Block 19 Kemena Land District (Being part of Lot 76 Block 19 Kemena Land District) containing an area acquired 6.9550 hectares and situated at KM63 Miri-Bintulu Road to the north east of Bintulu Town

			b. Lot 98 Block 19 Kemena Land District (being part of Lot 14 Block 19 Kemena Land District) containing an area acquired 7,516 square metres and situated at KM46, Bintulu/Miri Road to the north east of Bintulu Town c. Lot 85, 87, 92 and 95 Block 19 Kemena Land District (being part of Provisional Lease Lot 2080 Kemena Land District) containing an area of 56.5620 hectares and situated at KM61, Bintulu/Miri Road to the north east of Bintulu Town
3	LR15-6-2008 (BTU)	Golden Hope Plantation (Sarawak) Sdn Bhd v Supt of Lands and Surveys, Bintulu	Lot 10 Block 2 Lavang Land District (being part of Lot 4 Block 2 Lavang Land District) containing an area acquired 6.705 hectares and situated at Sungai Spod and Sungai Lavang, Bintulu

The appellant has made the following awards:

No	Description of Land	Amount of Compensation
1	LR15-2-2008 (BTU) Derawan Sdn Bhd v Supt of Lands and Surveys, Bintulu	Lot 16 Block 13 Kemena Land District (Being part of Lot 2099 Kemena Land District) Land value-NIL COMPENSATION Crops - RM18,182.00 TOTAL: RM18,182.00
2	LR15-3-2008 (BTU) Austral Enterprise Bhd v Supt of Lands & Surveys, Bintulu	a. Lots 85, 87, 92 and 95 Block 19 Kemena Land District Land value: NIL COMPENSATION Crops-RM195,235.00 TOTAL (less annual rent 2008): RM15,653.00 b. Lot 98 Block 19 Kemena Land District

		Land value: NIL COMPENSATION Crops-RM6,318 TOTAL (less annual rent 2008): RM5,042.00 c. Lot 86 Block 19 Kemena Land District Land value @ 6.955 hectare (with improved oil palm plantation) RM121,713.00 @ RM17,500.00 per hectare
3	LR15-6-2008 (BTU) Golden Hope Plantation (Sarawak) Sdn Bhd v Supt of Lands and Surveys, Bintulu	Lot 10 Block 2 Lavang Land District (being part of Lot 4 Block 2 Lavang Land District) Vacant land - RM741.00 Site Improvements - RM4.000.00 Oil Palms - RM 12,500.00 TOTAL (say): RM17,500.00

[7] From the above, it can be seen that the appellant gave no compensation in respect of the land value, resulting in the respondents' reference to the High Court pursuant to s 56 of the Land Code to dispute the decision of the appellant. The learned judicial commissioner revised the compensation amount awarded by the appellant by including the value of the lands. The High Court then valued the matured plantation land at RM23,500 per hectare and each oil palm tree at RM75.

[8] This appeal is in respect of that revision of the compensation amount by the learned judicial commissioner.

Civil Appeal No Q-01–79–02 of 2012 (Appeal 79 of 2012)

[9] This case relates to three land references which are as follows:

(a) LR 15–01 of 2010(MR) — Pelita Melor Sdn Bhd ('Pelitor Melor');

(b) LR 15–06 of 2010(MR) — Pelita Splendid Sdn Bhd ('Pelitor Splendid'); and

(c) LR 15–07 of 2008(MR) — Baram Trading Sdn Bhd ('Baram Trading').

[10] In Land Reference No 15–01 of 2010(MR), Pelita Melor is the registered owner of two parcels of land situated at Sungai Peking and Sungai Lelak, Tinjar, Baram (Lots 25 and 27) Tinjar Land District. The two lots were compulsorily acquired pursuant to a s 47 of the Land Code of Sarawak notice

published on 30 November 2006. The purpose of the aforesaid acquisition is for the gas pipeline reserved by Petronas. A

[11] By a s 48 notice published on 5 April 2007, an aggregate area of 15.138 hectares being part of Lot 25 and an aggregate area of 2.4893 hectares being part of Lot 27 were required for the gas pipeline project by Petronas. An existing gravel road with a total length of 43.38 metres and one wooden bridge on Lot 27 Tinjar were affected by the acquisitions. B

[12] An inquiry was held on 28 August 2007 by the appellant to determine the amount of compensation to be paid for the acquisition of the acquired lands in which no compensation was given to Pelita Melor on the ground that Pelita Melor only held only a provisional lease, meaning it held no propriety interest in the lands. As there was no crop planted in the acquired lands, no compensation was paid for any crops affected. A compensation amount of RM145,336 for the gravel road and wooden bridge affected by the acquisitions was given to Pelita Melor. C D

[13] In Land Reference No 15–06 of 2010(MR), Pelita Splendid is the registered owner of two parcels of land situated at Sungai Paong, Long Lama (Lots 1 and 27). E

[14] By a s 48 notice published on 5 March 2009, part of Lot 1 Block 5 Telang Usang Land District and part of Lot 27, containing an aggregate area of 13.924 hectares, were required for the gas pipeline project by Petronas and acquired. The acquisition included an existing gravel road with a total length of 824.39 metres. F

[15] An inquiry was held on 29 May 2008 by the appellant to determine the amount of compensation to be paid for the acquisition of the two lots of land in which again no compensation was given to Pelita Splendid on the ground that Pelita Splendid only held only a provisional lease meaning it held no propriety interest in the lands. The appellant paid compensation for the crops, ie, oil palms, planted in the two lots of land acquired, for a sum of RM47,952 and paid RM52,728.48 for the gravel road affected. G H

[16] In Land Reference No 15–06 of 2010(MR), Baram Trading is the registered owner of two parcels of land situated at Sungai Paong, Long Lama, Baram and described as Lot 2 Block 6 and Lot 10 Block 6 of Telang Usang Land District. I

[17] By a s 48 notice published on 5 March 2009, an aggregate area of 16.769 hectares being part of Lots 2 and 10 Block 6 Telang Usang Land

District were required for the gas pipeline project by Petronas and acquired. The acquisition included an existing gravel road with a length of 2 km and six wooden bridges.

[18] An inquiry was also held on 29 May 2008 by the appellant to determine the amount of compensation to be paid for the acquisition of the two lots of land in which in which no compensation was given to Baram Trading on the ground that it only held only a provisional lease meaning it held no propriety interest in the lands. The appellant paid compensation for the crops, ie, oil palms planted in the two lots of land acquired, for a sum of RM66,096 and paid RM690,253.76 for the gravel road and wooden bridges, making a total of RM756,349.76 paid as compensation.

[19] The above decisions of the appellant resulted in the respondents' reference to the High Court pursuant to s 56 of the Land Code. The High Court revised the compensation amount awarded by the appellant by including the value of the lands.

[20] This appeal is in respect of that decision of the High Court's revision of the compensation amount.

ISSUES

[21] Having heard submissions and perused the records of appeal, we are of the considered view that the determinative issues are as follows:

(i) Whether The Respondents are entitled to compensation for lands, which are issued under provisional leases and acquired compulsory pursuant to the Land Code of Sarawak for the purpose of the laying of an underground gas pipeline by Petronas in the context of sections 28 and 37(a) of the Land Code? and

(ii) Whether The Learned Judicial Commissioner was correct in revising the value of matured plantation land to RM23,500.00 per hectare and the value of each oil palm tree to RM75.00?

[22] We note here that issue (i) is common to both appeals. As for issue (ii) learned counsel for the appellant had informed us that our ruling on issue (ii) will also bind Appeal 79 of 2012. Be that as it may and having perused at the grounds of decision of respective High Court, we find it necessary to and will deal with it separately in our grounds later.

[23] Issue (i):

Whether the respondents are entitled to compensation for lands, which are issued under provisional leases and acquired compulsory pursuant to the Land Code of Sarawak for the purpose of the laying of an underground gas pipeline by PETRONAS in the context of ss 28 and 37(a) of the Land Code?

[24] The starting point of our deliberation here is s 28 of the Land Code which states:

(1) No State land shall be alienated under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent:

Provided that, when immediate survey of any state land is impracticable, the Superintendent may order that provisional lease in Form C in the First Schedule be executed in favour of the person entitled.

(2) Every provisional lease shall specify the approximate extend and area of the land included therein but shall not entitle the holder to a grant or lease of the whole area specified.

(3) Notwithstanding the payment by him of any rent in respect of the area stated, the registered proprietor of any provisional lease shall have no right to registration of a lease in Form B in the First Schedule for an area equal to the area stated to be alienated if on survey such area is found not to be available.

(4) Save where the context otherwise requires, this Code in connection with leases shall apply to provisional leases and references to a lease shall include a provisional lease.

[25] Learned counsel for the appellant urges this court to interpret s 28(1) to mean that there is no alienation of land by the state government until such time as the final survey of land is completed by the respondents.

[26] The premise of learned counsel's submission can be found in para 3.1.3–3.1.6 of his written submission which reads as follows:

3.1.3 It is my *respectful submission* that firstly, the words 'no alienation of State land under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent' connotes the meaning that alienation of state land only been concluded when the survey of the land has been completed.

Secondly, even the proviso of section 28(1) in the case of provisional lease shall be issued to the person entitled when it is *proven to be not practical* for an immediate survey to be carried out.

Thirdly, the terms and conditions for the survey to be completed and carried out to determine the actual area for the alienation of the state land for the provisional lease has been *incorporated in the letter of offer and*

acceptance of alienation of state land, and specified as condition (iii) of the Provisional Lease.

3.1.4 Section 28(1) of the Land Code has to *be read together with subsection (2)*, based on this provision and since there has never been any final survey to determine the actual area of the lands concerned, it *does not entitle the Respondent* to the whole area mentioned in the provisional lease.

3.1.5 The specific condition (iii) of the provisional lease for Lot 16, Block 13 Kemena Land District (being part of Lot 2099 Kemena Land District) (Derawan Sdn Bhd in LR No. 15-2-2008(BTU), Lot 98 Block 19 Kemena Land District (being part of Lot 14 Block 19 Kemena Land District) and Lot 85, 87, 92 and 95 Block 19 Kemena Land District (being part of Provisional Lease Lot 2080 Kemena Land District) (Austral Enterprise Bhd in LR No. 15-3-2008 (BTU) respectively which was incorporated in the letter and acceptance terms and conditions of alienation of land to the Respondents clearly stated that:

The holder of this Provisional Lease shall be entitled to a lease of an area equal to the area above stated but only to such an area as the survey shows to be available.

3.1.6 Thus, based on section 28(1) & (2) of the Land Code and also special condition (iii) of the Provisional Lease, it is further submitted that the *alienation of the State land is conditional subject to the survey has been completed to determine the actual area*. (Emphasis added.)

[27] This issue in fact had been deliberated before by the High Courts of Bintulu and Miri. In the case of *Wangsa Mujur Sdn Bhd v The Superintendent Lands and Surveys Miri Division, Sarawak and other applications* [2013] 10 MLJ 452; [2012] 1 LNS 120 Rhodzariah Bujang J faced with the same argument of learned counsel for the appellant opined as follow:

The words used in s 28 are indeed plain and unambiguous and when I give them their ordinary and natural meaning, what is provisional is not the title to the land but the acreage of land. This is re-emphasised in special conditions (iii) in the provisional lease in which it was stated that the lease holder is only entitled to an area shown by a final survey but not to the area specified in the provisional lease. The fact that the acreage covered under the said lease is provisional means that both he and the government bears an equal risk of an under compensation or an over compensation for the acquisition of the land since the acreage is not definite yet. The risk, in other words, cuts both ways. However, in all these three cases, such a risk is greatly minimised, even obliterated, by the fact that only a portion of the land under the provisional lease had been acquired — not the whole of it. As a title holder the objector has the same proprietary rights over the land as that of a lease holder as is clearly stated in sub-s (4) to s 28 and as is his constitutional right, the deprivation of it must entitle him to compensation.

[28] In the case of *Sebakai Plantation Sdn Bhd v The Superintendent, Lands and Surveys, Bintulu Division* Land Reference No 15–04–2008 (BTU)

(unreported) the learned judicial commissioner which is the same judicial commissioner in Appeal 80 of 2012 held as follows:

> Finally in respect of the interpretation of s 28(2) of the Code and the not available special condition on post PL acquisition and the objector's right to claim compensation, the court will find that the survey contemplated in s 28 of the Code is to be conducted to find pre-PL unavailability before the date of the PL or a 'title survey'. Post PL unavailability attaching to the PL Land after the issue of the PL is not unavailable within the meaning of s 28(2) of the Code and the not available special condition from the PL land as to disentitle the objector from claiming compensation for any part of the PL Land that is discovered to be made unavailable post PL. The objector as the registered owner is entitled to compensation for any post PL excision of any part of the PL land found to be unavailable as such.
>
> The PL being a document of title, there must be clear words in s 28 of the Code and the special conditions in the PL to deprive the objector of their property rights.
>
> Since there are no special conditions attached to the PLs reserving excision for the gas pipeline project post PL in the manner as was done for roads by special conditions (i)(c) and (vi) for LR2 and LR3 respectively, the objectors in LR2 and LR3 (a) are therefore entitled to be compensated for the compulsory acquisition of their PL land made post PL. (Emphasis added.)

[29] As for the learned judge in Appeal 79 of 2012 his reasoning is encapsulated in the following paragraphs:

> 14. The respondent submitted that reading s 28(1), there shall be no alienation of state land unless and until a survey has been carried out and completed. Secondly, the objectors were obliged under the provisions of s 28 and under the terms and conditions of the provisional leases to carry out and complete the survey of their respective parcels of land. It was implicitly submitted that since no survey has been carried out, there was no alienation of the lands to the objectors. It was also submitted that since no survey has been carried out, the actual areas to be alienated to the objectors have not been determined and did not belong to the objectors.
>
> 15. The above submissions cannot stand because the proviso to s 28(1) qualifies that subsection so that when immediate survey of any state land is impracticable, the Superintendent may order that a provisional lease be executed in favour of the person entitled. There is no provision in s 28 or in the Land Code or in the terms and conditions in the provisional leases in these cases to require that the objectors shall carry out and complete the survey within a certain time.
>
> 16. In the three cases before the court, the superintendent has issued the provisional leases to the objectors in respect of the lands alienated to them pursuant to s 28 of the Land Code. Section 28(4) specifically provides that any reference to lease or a lease shall include a provisional lease. In the Land Code, the term 'alienation' is defined to mean the sale, lease or other disposal by a document of state land by or on behalf of the government and a

'document of title' means a grant, lease of state land, occupation ticket or other document evidencing title to land whenever issued, but does not include a licence, permit or caveat.

17. After the lands were alienated to the objectors and the provisional leases in respect thereof were issued to them, they have become the registered owner of their respective parcels of land: see *SOP Plantations (Suai) Sdn Bhd v Ading Lavang & Ors* [2004] 4 MLJ 180; [2004] 1 LNS 331, *Novelpac-Puncakdana Plantation Sdn Bhd v Anchih anak Buap* [2004] 4 MLJ 524. Being the registered owners, their rights to the lands are protected under art 13 of the Federal Constitution and any acquisition of their lands or parts thereof must be in accordance with the law ie, there must be reasonable compensation for the lands acquired: *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204; [1982] CLJ 314 (Rep); [19821 CLJ 65.

[30] We have examined the rationale and the reasonings of each individual ground with great care. And we cannot find any error in their approaches in constructing s 28 of the Land Code. It may be that they took different approaches in construing s 28 but they all reached the same conclusion which we subscribe to. We further say that to interpret s 28 of the Land Code in any other way would lead to absurdity and an affront to fairness and reasonableness. It can be inferred that when the respondents acquired the lands and paid the respective premiums, they did not expect that alienation of a provisional lease was in fact not an alienation. In our view, if that were told to them, it can also be inferred that they as reasonable people would not accept such a transaction. The aforesaid inferences in our view stand up to reasons and fairness.

[31] Further if the legislature had intended to have the interpretation as proposed by learned counsel, it could have easily left out the proviso in the s 28(1) or alternatively give the respondents only a licence to enter the lands. We are also of the view that if the appellant's view is correct, there is no necessity for invoking s 48 of the Land Code acquisition as the respondents do not possess any title to the lands. One can only acquire when the other person possesses of some rights to land. In the cases before us, the appellant applied and followed the procedures as provided by all the relevant provisions in the Land Code of Sarawak (ss 47, 48, 49 and 51) concerning compulsory acquisition of lands. The action of the appellant speaks volume for itself.

[32] It is for the reasons stated above that we hold that the respondents are the legal, registered and beneficial owners of the lands under the provisional leases. The consequence is simply that art 13 of the Federal Constitution kicks in so to speak in that the respondents are entitled under the supreme law of the Land to be compensated with adequate compensation for the loss of their lands. And when the appellant failed to compensate the respondents for their

loss, he had breached his constitutional duty. With that we now consider the submissions concerning s 37(a) of the Land Code.

[33] Section 37(a) of the Land Code of Sarawak reads as follows:

> 37 All land shall be subject to the following implied rights reserved to the Government —
>
> (a) The rights, without payment of compensation therefor, of making upon all land, drains, sewers and ditches, of laying down pipes and cables for water, gas or electricity, of erecting poles and wires for electric power, communication towers and using, repairing and maintaining the same: Provided that if such works interfere with improvements. Permanent buildings or cultivated ground, such compensation shall be allowed for disturbance or damage as shall be determined by the Superintendent.

[34] Premised on the above, the appellant submits that the respondents are not entitled to the value of lands in which the gas pipes are laid as the provisional leases are subject to the implied rights reserved to the government under s 37 of the Land Code.

[35] Learned counsel for the respondent in Appeal 80 of 2012 takes strong objection to the appellant raising this issue on the ground that this was never an issue in the High Court. The case of *Haji Ali bin Haji Othman v Telekom Malaysia Bhd* [2003] 3 MLJ 29; [2003] 3 CLJ 310 was referred to us where this court said this:

> We find it unnecessary to deal with the complaint based on the alleged breach of the nemo judex rule because, as observed by Denis Ong Jiew Fook JCA during argument and conceded by learned counsel for the appellant, this is a point not canvassed in the court below. The principle is too well settled that this court will not, save in limited cases, entertain a point of law not taken at first instance. If authority is needed for this it may be found in the decision of the Federal Court in *Gulwant Singh v Abdul Khalik* [1965] 2 MLJ 55; [1965] 1 LNS 47; where Thomson LP said at p 58:
>
> > A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinised (*The Tasmania* [1890] 15 App Cas 223 at p 225). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski v Wellington Corp* [1959] AC 53 at p 69) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at p 480) (per Lord Watson):
> >
> > When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

In the present case, we found ourselves in a most difficult position so far as the point at issue is concerned. It was not raised in the pleaded case. It was not properly pursued in evidence. No argument was directed upon it. Accordingly, the judge was not given an opportunity to express his views upon it. It is in these circumstances that we decided not to entertain any argument on the *nemo judex* point.

[36] The objection by learned counsel for the respondents has merit. But be that as it may, we shall deal with it as it was raised in the High Court in Appeal 79 of 2012.

[37] The learned judge in Appeal 79 of 2012 had rightly found no merit in the argument for the simple reason that s 37 of the Land Code does not provide for acquisition of lands without payment of compensation. If one reads the section properly, it talks of the rights of entry into lands for the purpose of laying public utility infrastructure and if such entry for works interfere with the enjoyment of the owners, compensation must be paid for such interference. As pointed out by the learned judge in Appeal 79 of 2012, there was no specific reservation for gas pipe prior to the issuance of the provisional leases and hence to deny the respondents now of compensation would be unjust as they had paid premiums for the provisional leases without any reservation for gas pipes.

[38] Accordingly we also find no merit in the submission put forth by the appellant.

[39] Issue (ii):

Whether the learned judicial commissioner was correct in revising the value of matured plantation land to RM23,500 per hectare and the value of each oil palm tree to RM75?

Appeal 80 of 2012

[40] It should be noted from the outset that the valuation arrived at by the High Court was with the benefit of two assessors who are qualified in their profession as valuers. In short they are experts in their field. They have also received representations from the appellant and the respondents as to what the appropriate valuation should be. The appropriate valuation of course is the market value of the respective lands. Hence the decision or conclusion of the learned judicial commissioner is premised from inputs from no less than four experts in their field.

[41] It is our considered view that the findings by learned judge in a land reference should not be disturbed unless with cogent reasons showing that his findings are so perverse and unreasonable that no reasonable tribunal similarly circumstanced would have come to. This principle of law must be applied

vigorously bearing in mind that valuation of market value of lands is not an exact science but one of subjective opinions. That burden to provide those cogent reasons lies with the appellant.

[42] We have read the grounds of judgment of the learned judicial commissioner and even with a cursory glance it can be easily observed that he had taken into all the relevant considerations in his deliberation of the valuation of the lands. He had discussed the investment method used by the respondents and the comparable sales adopted by the appellant and with the advice of the two assessors had adopted the comparable sales method. Hence on this count the appellant should have no complaints. The learned judge also relied on high authority in the case of *Iun Chung Yang & Anor v Superintendent of Lands and Surveys, First Division, Sarawak* [1980] 2 MLJ 15; [1979] 1 LNS 35, where Chang Min Tat FJ had held as follows:

> We agree that the comparison method that is the method of taking the recent bona fides sales of land in the vicinity possessing similar or near similar characteristics, recommended in *Nanyang Manufacturer v CLR Johore* [1954] 1 MLJ 69; [1953] 1 LNS 59 and since consistently adopted by our courts at all levels, is a fair method but in applying it, it has to be borne in mind that the operative condition is lands acquired and possessing similar advantages. *It does not work when transactions of purchase of bare lands are used as the yardstick for lands with houses. Nevertheless, we do not think that difficulties of assessment absolve the court from its task of doing its duty from adopting another method open to it to do so*. (Emphasis added.)

[43] Of immense importance the learned judicial commissioner had in his grounds summarised the opinions of the assessor and they are these:

> (c) Assessors' opinions
>
> The parties have requested for written submissions and on their filing, copies of which were extended to the learned Assessors. The court has because of this adopted the procedure accepted by the Federal Court in the case of *Aik Hoe* case (at p 245G) in not summing up and following s 63 of the Code to take the opinion of the learned assessors orally in Court.
>
> The Court had read and explained ss 60–61 of the Code and the legal considerations as set out earlier to the learned Assessors as required by s 62(4) of the Code. It being impracticable to record orally the opinion of the learned assessors because of the written submissions by the parties, the learned assessors had after consultation with the court gave their respective written opinion.
>
> Assessor 1 had adopted RW1's assessment for LR3 but has increased it for LR2 and LR6 as set out in Table 14.
>
> Assessor 2 found that comparable 2 in Appendix B of the RW1 valuation report to be the best comparable that is at RM15,678. After taking into consideration the time factor, total planted area, land size, location etc, he is of the considered opinion that the rate of RM25,000 per hectare is a fair and reasonable market value.
>
> The figures of the valuations before court are as follows:

TABLE 14

Valuations before Court

Case No.	Area (hectare)	RV (RM)	OV (RM)p/ha	Assesor 1 (RM)p/ha	Assesor2 (RM)p/ha
LR2	Lot 2099	Nil			
Area:	4,511			20,000.00	25,000.00
Taken:	3.598		34,095.13		
LR3(a)	Lot 2080	Nil			
Area:	6,334.6		29,568.58–		
Taken:	56.562		31,909.58	17,500.00	25,000.00
(Bare:)	(15.657)		(5,000.00)		
LR(b)	Lot 14	Nil			
Area:		6,318.00	31,663.86	-	25,000.00
Taken:	92.9				
Crop:	0.7516				
LR3(c)	Lot 79				
Area:	417.4	17,500.00	30,421.04	17,500.00	25,000.00
Taken:	6.9550		31,909.57		
LR6	Lot 4				
Area:	6,024	17,500.00	30,492.87	19,000.00	25,000.00
Taken:	6.705				

[44] The fact that the learned judicial commissioner had kept the opinions of the two assessors at the foremost of his mind in his deliberation shows that he was mindful of his primary duty to pay heed to those two experts.

[45] Reverting to the complaints of the appellant in respect of the award of RM23,500 per hectare, learned counsel contends that the learned judge was wrong to rely on *Austral Enterprise Bhd v The Superintendent of Land and Survey* (Land Reference No 15–2–2006 (BTU) (unreported)). We with respect cannot agree as the learned judicial commissioner had given reasons why he had had adopted that award. One determinative matter which learned counsel for the appellant did not refer to in his submission is that the respondents' lands are now cut into half. This is how the learned judge puts it:

> Another prime consideration that has a material impact on the court's decision in these land references is the inconvenience to the objectors as plantation owners to have their estate cut into two parcels with a stranger, a gas pipeline (with the attendant fire risk) separating their two parcels of land, it will be different if it was for a road.

And he concludes as follows:

> With the above cited case in mind and after due consideration of the submissions of the objectors, the respondent and the learned assessors, the court will consider that the fair market value for developed plantation land as RM23,500 and for raw plantation land as RM5,000 per hectare. The Court will value a palm oil tree at RM75 each instead of RM48. (RM21,000 - RM9,550 = RM11,450 divide by 150 palm trees = RM76.33).

[46] Hence we see no merit in the complaints of the appellant in the manner in which the learned judicial commissioner arrived at his decision.

Appeal 79 of 2012

[47] Learned counsel for the appellant did not submit on this issue and relies on his submission in Appeal 80 of 2012. Be that as it may, we will examine the rationale of the learned judge in his approach to the valuation of the acquired lands.

[48] There is no dispute as that the value of the relevant lands is RM5,000 as this is agreed to by the appellant's valuer and the two assessors. This being the case, the award of the learned judge is confirmed.

[49] In respect of the Pelita Splendid and Baram Trading references, the learned judge adopted the comparable sales valuation as recommended by the two assessors and concluded that the value of cultivated and non-cultivated lands to be RM23,000 and RM6,000 respectively. In view of what we have stated in Appeal 80 of 2012 about interfering with findings of award in a land reference, we see no reason to disturb the learned judge's findings. We also find that the learned judge's approach is supported by established case laws, (see *Leong Kam Hoong v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam and another appeal* [2001] 1 MLJ 186; [2001] 1 CLJ 1). Accordingly we find that the award by the learned judge to be correct and appropriate.

CONCLUSION

[50] For all the reasons stated above, we dismiss both the appeals with costs of RM20,000 for each appeal.

A *Both appeals dismissed with costs of RM20,000 for each appeal.*

Reported by Ashok Kumar

B

C

D

E

F

G

H

I